

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Dockets Nos. 95-20, 98-10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review – Review of Computer III and ONA)	
Safeguards and Requirements)	

REPLY COMMENTS OF EARTHLINK, INC.

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EarthLink, Inc., by its attorneys, hereby replies to the comments in the above-captioned rulemaking proceeding on the appropriate legal and policy framework for the existing and future wireline telephone network.¹ With the exception of the Bell Operating Companies and their consultants (“BOCs”), a broad diversity of the commenting parties are in agreement that deregulation of incumbent local exchange carrier (“ILEC”) broadband transport services would disserve the public interest. In these Reply Comments, EarthLink points out that the BOCs’ deregulatory proposals are widely opposed because they are unsupported by the facts of broadband deployment, they would undercut the reasonable reliance interests of all other participants in broadband services,

¹ Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC No. 02-42 (rel. Feb. 15, 2002) (“NPRM”).

including ISPs and consumers, and they would undermine intramodal competition for no legitimate public purpose.

Introduction and Summary

A broad range of commenters – ISPs, consumer advocacy groups, long-distance carriers, States, and even federal agencies -- have all urged the Commission to retain the fundamental Title II principles as applied to broadband transport of incumbent LECs. The reasons are many and varied, and the public interest is undeniable.

In contrast, however, the large incumbent LEC commenters in this proceeding urge the Commission to take sweeping regulatory action which would conflict with both law and common sense. First, the incumbents have proffered no public interest benefits that would follow from their proposed regulatory changes. Logic cringes at the notion that relaxation of network-opening and nondiscrimination rules and regulations would improve competition or accelerate the rate of DSL deployment. The proponents of these proposals have failed to offer any facts to overcome this disability. Ambiguous ILEC suggestions that they would offer services under private contract are wholly lacking as a basis for concluding that independent broadband Internet access service would continue or that the terms of such unilateral arrangements would serve the public interest. Instead, this proceeding requires a solid evidentiary record explaining how such deregulation would impact the information services market, allowing for a decision to be based on the facts, not vague promises. The Commission ought not impose broad regulatory change where, as here, the current rules are working well and the proposed changes will negatively impact the public interest.

Second, a host of parties, including independent ISPs, consumers, and state and federal agencies, have relied on the nondiscriminatory access provisions of Title II and the FCC *Computer Inquiry* proceedings. These interests cannot be ignored. For over two decades, the FCC's decisions have supported and encouraged access on a common carrier basis to ILEC services, including broadband services. Entrepreneurs were encouraged to develop information services for delivery over narrowband and broadband transmission. Today thousands of ISPs, including ILEC affiliates, compete against one another, each knowing that, as the FCC promised, the incumbent LECs would provide DSL transmission on a nondiscriminatory basis. Federal agencies, state regulators and legislatures, likewise, took the FCC's regulatory scheme to heart, basing their own rules and statutes on principles set in federal law. And the public, the millions of consumers who get high-speed Internet access service via incumbent LEC-provisioned DSL, also rely on the ability to choose their ISP, and to access information providers without interference from the incumbent LEC. Significantly, the BOC commenters fail to resolve these interests, or to address the multitude of practical problems that would arise from wrenching out the regulatory scheme that forms the very framework for both narrowband and broadband Internet access and superimposing a new one for broadband.

Finally, the Commission should not and cannot stray from the regulatory tenets of the Communications Act ("Act") that remain unchanged when applied to broadband access. The essence of the statute, common carrier precedent, and the *Computer Inquiries* decisions is the same: the Commission's mandate is to ensure that competitors can count on access to the incumbent LECs' networks and on nondiscriminatory treatment by the ILECs. This is still binding law today. Indeed, even the recent *USTA v.*

FCC decision confirms that the Commission must look to the local markets where, as the FCC's brief explained, there are no viable or ubiquitous common carrier alternatives to the incumbent LEC networks. In the absence of vibrant competitive choices in the local access markets, the current regulatory scheme is necessary to meet the requirements of the Act.

Discussion

I. THE BOCS' PROPOSALS FOR DEREGULATION OF BROADBAND TRANSPORT HAVE NO BASIS IN LAW OR FACT.

A. The Act Requires Title II Regulation of Incumbent LEC DSL Transport and "New Networks" Services.

Contrary to the claims of the BOC commenters, the Commission may not sidestep the obligations of the Communications Act – especially the obligations of Title II and the *Computer Inquiries* precedent – by unilaterally re-defining an open-ended set of incumbent LEC services as "information services." Deregulation under Section 10 of the Act is "[a]n integral part of th[e] framework" established by Congress which may be employed by the Commission, as appropriate, "if the Commission makes certain specified findings with respect to such [statutory] provisions or regulations."² However, BOC efforts to achieve deregulation through statutory semantics – that is, by re-defining transport services as "information services" for the resulting deregulatory status – badly undermines the Title II common carrier goals of the Act and Commission precedent.

As EarthLink and other commenters discussed in depth, the incumbent LEC bulk DSL services under consideration in this proceeding have been firmly and repeatedly

² *In the Matters of Bell Operating Companies; Petitions for Forbearance from the Application of Section 272, Memorandum Opinion and Order*, 13 FCC Rcd. 2627, ¶ 1 (1998).

classified as common carrier services subject to *Computer Inquiry* obligations. For example, as explained in the *Advanced Services MO&O*, advanced services offered by incumbent LECs, including DSL, “are telecommunications services” and BOCs are obligated to offer such services to competing ISPs.³ Again, in the *Advanced Services Second R&O*, the Commission was unequivocal that “bulk DSL services sold to Internet Service Providers . . . are telecommunications services, and as such, incumbent LECs must continue to comply with basic common carrier obligations with respect to these services.”⁴

Nor is ILEC DSL transport provided to ISPs “telecommunications” offered on a private carriage basis.⁵ The suggestion of Qwest that bulk DSL services are currently

³ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd. 24012, ¶¶ 35-37 (1998) (“*Advanced Services MO&O*”).

⁴ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 21 (1999) (“*Advanced Services Second R&O*”). See, also, *In the Matter of GTE Telephone Operating Cos., Memorandum Opinion and Order*, CC Dkt. No. 98-79, FCC 98-292, ¶ 32 and n.111 (rel. Oct. 30, 1998), *reconsideration denied*, *Memorandum Opinion and Order*, FCC 99-41 (rel. Feb. 26, 1999) (“We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable,” citing 47 U.S.C. §§ 204-205); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, Report and Order*, 16 FCC Rcd 7418, ¶ 46 (2001) (“*CPE/Enhanced Services Unbundling Order*”) (“The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers”). Contrary to Verizon’s claims, these were well-reasoned decisions and not “regulatory creep.” Comments of Verizon at 11.

⁵ *NPRM*, ¶ 26 (seeking comment on whether xDSL is “telecommunications”).

offered on a “private carriage” basis flatly contradicts Commission precedent.⁶ Because it offers service indifferently under tariff to all eligible customers, Qwest is providing the service on a common carrier basis; as the court stated in *NARUC I*, “A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.”⁷ Indeed, Qwest’s claims simply do not add up: in an effort to show “individually negotiated terms” for its bulk DSL offerings, Qwest asserts it offers four standard DSL services⁸ to “over 400 independent ISPs.”⁹ Further, Qwest’s general assertions for “blanket” private carriage treatment of DSL service conflict with the Commission precedent requiring a careful case-by-case examination before such a determination is reached, as well as a full examination of whether a legal compulsion arises to offer service on a common carrier basis.¹⁰

Future incumbent LEC service offerings – such as Broadband Passive Optical Networks (“BPON”) or other services are generally alluded to by the incumbent LECs – are likewise governed by *NARUC I* precedent. Incumbent LECs should be required to offer any “new networks” or BPON-type service on common carrier terms under Title II

⁶ Comments of Qwest at 16; *see*, n. 4, *infra*.

⁷ *Id.*, at 30; *see* Qwest Corporation, Tariff F.C.C. No. 1, ¶ 8.4 (“Qwest DSL Service”); *NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (“*NARUC I*”).

⁸ *Id.*, at n.40.

⁹ *Id.*, at 14, 30 (emphasis in original).

¹⁰ *State of Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000) (indiscriminate offering of telecommunications to restricted class of customers may constitute common carriage offering); *Virgin Islands Telephone v. FCC*, 198 F.3d 921, 924 (D.C. Cir. 1999) (After the 1996 Act, the FCC has held that “a carrier has to be regulated as common carrier if it ‘will make capacity available to the public indifferently’ or if ‘the public interest requires common carrier operation of the proposed facility,’” *citing*, *Cable & Wireless, PLC*, 12 FCC Rcd. 8516, ¶¶ 14-15 (1997)).

requirements. The BOCs are vague on the fundamental issue of what exactly constitutes a “new network” service subject to more favorable regulatory treatment than other network services. Certainly, the Commission cannot create a new regulatory scheme for each technological or engineering advance in network architecture. Instead, *Computer Inquiry* principles of nondiscriminatory access remain just as relevant as the network evolves, and thereby encourage network changes to improve transport services for the benefit of all users of the network.¹¹

After all, where a carrier possesses market power or, separately, controls bottleneck facilities, there arises a legal compulsion to offer the transmission services on a common carrier basis.¹² Since the incumbents’ “new networks” will almost certainly rely upon their bottleneck control over the local loop, the central office space and facilities, as well as interoffice facilities, Title II obligations are necessary. As the Supreme Court noted, the addition of fiber-optic cable does not particularly alter the nature of the incumbent LEC’s local network from a regulatory perspective: “[t]he local loop was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used, albeit to a far lesser extent than in long-haul markets, ” and the loop is still

¹¹ *In the Matter of Amendment of Sections 64.702 of the Commission’s Rules, Report and Order*, 104 F.C.C. 2d 958, ¶ 211 (1986) (“*Computer III*”) (subsequent history omitted) (if carriers design their networks around ONA principles, such an approach is “self-enforcing in controlling discrimination”). This approach does not limit the network owner’s ability to recover its costs or to enjoy profits on prudent network investments. Adherence to the *Computer Inquiry* approach also avoids regulatory shifts or compromises in return for promises of future “new networks.”

¹² “[A] duty to deal indifferently, legislatively imposed in 1934 for communications carriers, was imposed because of a recognition of a carrier’s monopoly control over essential services.” *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445, 468, ¶ 62 (1981).

“a transportation network for communications signals.”¹³ As the Supreme Court also noted, the incumbent’s advantages are obvious: “[i]t is easy to see why a company that owns a local exchange . . . would have an almost insurmountable advantage not only in routing calls within an exchange, but through its control of this local market, in markets for terminal equipment and long-distance calling as well.”¹⁴ This same ownership of the ubiquitous local access facilities used to transport data services likewise establishes more than sufficient cause for common carrier treatment of the incumbent.

Moreover, the lack of alternative *common carrier* facilities available for users and ISPs in many markets also necessitates the application of Title II to these “new network” services.¹⁵ It is equally difficult to envision how the incumbents’ “new networks” would be offered in competition with alternative common carrier facilities in today’s market, especially in light of the fact that cable operators are not currently offering common carrier service.¹⁶

If, after thorough consideration of an appropriately-directed record, the Commission finds that specific Title II obligations are too onerous or inappropriate, the

¹³ See, *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1661 (2002).

¹⁴ *Id.*, at 18.

¹⁵ *Cable & Wireless, PLC, Cable Landing License*, 12 FCC Rcd 8516, 8522 ¶ 15 (1997) (Under *NARUC I*, the Commission “generally [has] focused on the availability of *alternative common carrier facilities* in assessing whether to require that a proposed cable be offered on a common carrier basis.”) (emphasis added); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474 (D.C. Cir. 1984) (A “key concern” is “the adequacy of the remaining common carrier capacity to serve users’ needs.”).

¹⁶ Cable facilities should not be deemed alternative facilities available to ISPs since the Commission has held that cable facilities are not offered on a common carrier basis. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, GN Dkt. No. 00-185, CS Dkt. No. 02-52, FCC 02-77 (rel. March 15, 2002).

proper course for deregulation of DSL or “new networks” services is, of course, laid out specifically for the Commission in Section 10 of the Act.¹⁷ As the Commission has held,

‘the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why statutory criteria are met.’ We therefore cannot forbear in the absence of a record that will permit us to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision.¹⁸

The incumbent LECs’ general recitation of the regulatory disparity with cable modem services is inadequate to meet the statutory requirements for regulatory forbearance, since it fails to address the negative effects of deregulation on the public interest where there is a lack of effective competition in the marketplace.¹⁹

B. BOCs Have Failed to Identify the Services At Issue, and Have Presented Insufficient Cause to Justify Deregulation of Services.

The incumbent LEC commenters have failed to present specific and material facts to justify their proposed significant shifts in regulation. The paucity of facts by the few proponents of sweeping deregulation renders it impossible for commenters to evaluate

¹⁷ 47 U.S.C. § 160.

¹⁸ *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, 17420 ¶ 13 (2000), *citing*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 113 (1998) (“*Wireless Forbearance Order*”).

¹⁹ *See, Verizon Communications Inc.*, 122 S. Ct. at 1678 (“A basic weakness of the incumbents’ attack, indeed, is its tendency to argue in highly general terms . . .”); *see also*, Comments of EarthLink, Inc., CC Dkt. No. 01-337 at 31-34 (March 1, 2002) (discussion of how deregulation of incumbent LEC DSL services would not meet public interest under Section 10 standards).

meaningfully the proposals, and impossible for the Commission to render a reasoned administrative decision adopting the proposals.²⁰

As an initial matter, the incumbent LECs provide no specific or consistent explanation of the telecommunications services that would be subject to deregulation. Verizon, for example, argues that “broadband” deregulation should include any service – present or future – that is based on packet-switching or a successor technology,²¹ while SBC has proposed in a related proceeding the deregulation of any service it offers with transmission capabilities over 56 kbps.²² BellSouth goes further, introducing the concept of “provider parity,” whereby incumbent LECs would be deregulated regardless of the telecommunications services offered.²³

The Act, however, requires the Commission to engage in a fact-specific examination of the services subject to possible deregulation, including a fact-based evaluation of the effect of the proposed deregulation on competition in the relevant

²⁰ See, e.g., *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 19947, 19961 ¶ 25 (1999)(BOC requests for forbearance failed because the “BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims . . .”), *remanded on other grounds*, *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (Although the court did not disturb the FCC’s determination that the BOC petitioners’ general conclusions about market share did not provide adequate data to support a claim of reduced market share, the court stated that a policy making such data essential to a showing of non-dominance may be reasonable and remanded the case for the FCC to provide an explanation for such policy.).

²¹ Comments of Verizon at 6.

²² SBC Petition for Expedited Ruling that it is Non-Dominant in Its Provision of Advanced Services And For Forbearance From Dominant Carrier Regulation Of Those Services, at n. 2 and 30 (filed Oct. 3, 2001), incorporated in CC Docket No. 01-337.

²³ Comments of BellSouth at 8-9, 13-15.

markets and on other public interest factors.²⁴ Since the BOCs chose an open-ended set of future and existing services for deregulation, several commenters have noted, quite reasonably, that this approach could mean deregulation of voice services,²⁵ or special access services already subject to certain FCC regulatory relief,²⁶ or it could materially impact facilities-based competitive LECs by impeding their ability to obtain access to high-capacity loops.²⁷ Such deregulatory proposals are simply too vague to enable evaluation of public interest factors in a coherent manner.

Nor is it apparent what regulatory relief is necessary for the BOCs beyond that which is already available. For example, BellSouth already takes advantage of deregulation under the *Pricing Flexibility Order* in its provision of ADSL services.²⁸ In this proceeding, however, BellSouth does not explain what more, if anything, it needs to

²⁴ See, e.g., *In the Matters of Bell Operating Companies; Petitions for Forbearance from the Application of Section 272*, Memorandum Opinion and Order, 13 FCC Rcd. 2627, ¶¶ 52-58 (1998) (describing BellSouth's reverse directory assistance service subject to forbearance of certain Section 272 requirements).

²⁵ Comments of Sprint Corp. at 3-4; Comments of Illinois Commerce Commission at 29; Comments of NARUC at 11-12.

²⁶ See *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Given the breadth of the BOCs' proposed "broadband" deregulation, since almost all special access services would exceed 56 kbps, the proposal would eviscerate the Commission's measured Phase I and II approach in the *Pricing Flexibility Order*. EarthLink also notes that the *Pricing Flexibility Order* at n. 280 expressly provides the incumbent LECs with Phase I and II flexibility for DSL services

²⁷ Comments of Time Warner Telecom at 18-19.

²⁸ BellSouth Transmittal No. 642, F.C.C. Tariff No. 1 (filed May 31, 2002). Indeed, BellSouth recently relied on the deregulation under Phase I and II Price Flexibility authority to revise its ADSL tariff for a price promotion on one-day's notice in certain MSA's. On June 17, 2002, BellSouth again requested Phase I and II deregulatory treatment of its multiple virtual channel ADSL services, as well as certain ATM and Frame Relay services. BellSouth Transmittal No. 647, F.C.C. Tariff No. 1 (filed June 17, 2002).

respond to the market, consistent with the public interest. Indeed, for MSAs in which BellSouth has met the competitive “triggers” for Phase I and II pricing flexibility, it enjoys the prescribed relief; for MSAs where BellSouth cannot show indicia of competition, however, the regulatory safeguards serve a vital and necessary role.

Further, the BOCs provide no specific facts that the deregulation advocated would yield any benefits to the public, such as price reductions or a wider array of services. Instead, the record shows that even with regulation, the incumbent LECs have raised prices and that retail DSL prices rose soon after the demise of several competitive LEC providers.²⁹ The BOCs’ proposed private carriage arrangements would simply permit incumbent LEC discrimination against consumers and ISPs, which also would likely result in upward pressure on retail prices. Moreover, the BOCs do not explain what, if any, retail services have been hampered under current regulation, nor do they explain what services would be offered for the public’s benefit in the absence of regulation.³⁰

Not even the BOC economists provide concrete arguments to explain why deregulation of the incumbent LECs’ networks in the current market environment would be in the public interest.³¹ Notably, none of the BOC economists examined the actual

²⁹ AT&T Comments at 67-68; *Third Report*, ¶ 106 (noting SBC and Verizon residential rate increases earlier in the year).

³⁰ Verizon claims that it wants to avoid tariff obligations in order “to experiment with innovative pricing schemes.” Verizon Comments at 3. Verizon, however, is free to engage in such pricing experiments today for its retail Internet access services, since they are unregulated information services.

³¹ *Compare, NPRM*, ¶ 48 (seeking comment on the costs and benefits of *Computer III* access requirements).